2002

State of Utah v. Raymond Flores Silvaz : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH	:	
Plaintiff/Appellee	:	
v.	:	
RAYMOND FLORES SILVAZ	:	Case No. 20020298-CA
Defendant/Appellant	:	

BRIEF OF APPELLANT

Appeal from a judgment of conviction for enticing a minor over the Internet, a second degree felony, in violation of Utah Code Annotated section 76-4-401 (Supp. 2002), assault against a peace officer, a class A misdemeanor in violation of Utah Code Annotated section 76-5-102.4 (1999), and interfering with a peace officer, a class A misdemeanor in violation of Utah Code Annotated section 76-8-305 (1999), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Bruce C. Lubeck, presiding.

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JURISDICTION AND NATURE OF THE PROCEEDINGS

This is an appeal from a judgment of conviction for enticing a minor over the Internet, a second degree felony, in violation of Utah Code Annotated section 76-4-401 (Supp. 2002), assault against a peace officer, a class A misdemeanor in violation of Utah Code Annotated section 76-5-102.4 (1999), and interfering with a peace officer, a class A misdemeanor in violation of Utah Code Annotated section 76-8-305 (1999). Utah Code Annotated section 78-2a-3(2)(e) (Supp. 2002) authorizes this Court to entertain appeals from cases not involving a first degree or capital felony.

STATEMENT OF THE ISSUES, STANDARDS OF REVIEW AND PRESERVATION OF THE ARGUMENTS

1. The definition of the crime of enticing a minor over the Internet ("Internet enticement statute") requires the State to prove that a person has not committed an

attempt, conspiracy, or solicitation crime but at the same time has solicited, seduced, lured, or enticed a minor to engage in prohibited sexual acts or has attempted to entice a minor to do so. Is this statute vague and/or internally inconsistent since it requires the State to prove both the nonexistence of an attempt, conspiracy, and solicitation and also that the defendant solicited or attempted to solicit a minor?

This Court reviews the interpretation of a statute for correctness. State v. Cox, 826 P.2d 656, 662 (Utah Ct. App. 1992). Trial counsel preserved this issue by requesting the trial judge to dismiss the charge because the Internet enticement statute was internally inconsistent. R. 212: 97-98.[1]

2. The Internet enticement statute requires the State to prove both the existence and the nonexistence of a solicitation or an attempt. Given this contradictory language, does that statute provide persons of ordinary intelligence notice of prohibited conduct?

The question of whether a statute is vague presents a legal question which this Court reviews for correctness. Provo City v. Thompson, 2002 UT App 63, ¶10, 44 P.3d 828. Defense counsel argued that the Internet enticement statute was "fatally flawed" because it is contradictory. R. 212: 98. In any event, the trial judge should have invalidated the statute under the plain error doctrine.

3. Could a reasonable jury have found Appellant Raymond Flores Silvaz guilty

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[1]The transcript marked "212" contains the trial transcript. The internal page numbers of that volume will be referred to as "R. 212" followed by the page number.

beyond a reasonable doubt given the contradictory language of the Internet enticement statute? In reviewing cases for sufficient evidence, this Court affords great deference to the jury verdict and will only reverse a conviction when reasonable minds must have entertained a reasonable doubt that the defendant committed the crime. State v. Goddard, 871 P.2d 540, 543 (Utah 1994). Defense counsel requested the trial judge to dismiss the enticement charge based on the conflicting terms of the Internet enticement statute and the lack of evidence. R. 212: 97-98.

4. Prosecutors may only comment on a defendant's failure to call witnesses when the prosecutor obtains advance permission from the trial court and the witnesses are equally available to both parties. The prosecutor here argued in closing statements that Mr. Silvaz's testimony was false because he failed to call as witnesses the people he was communicating with in an Internet chat room and whom could have supported that he lacked criminal intent. Did the prosecutor commit misconduct by commenting on Mr. Silvaz's failure to present witnesses?

This Court must review prosecutors' remarks to determine whether they called to the jury's attention improper matters and whether the erroneous comments probably influenced the jury's verdict. State v. Andreason, 718 P.2d 400, 402 (Utah 1986). The trial court plainly erred by failing to strike the prosecutor's inflammatory remarks. State v. Helmick, 2000 UT 70, ¶9, 9 P.3d 164.

STATUTORY PROVISION

Utah Code Annotated section 76-4-401 (Supp. 2002) defines the crime of enticing a minor over the Internet:

> (1) A person commits enticement of a minor over the Internet when, not amounting to an attempt, conspiracy, or solicitation under Section 76-4- 101, 76-4-201, or 76-4-203, the person knowingly uses a computer to solicit, seduce, lure, or entice, or attempt to solicit, seduce, lure, or entice a minor or a person the defendant believes to be a minor to engage in any sexual activity which is a violation of state criminal law.
>
> (2) It is not a defense to the crime of enticing a minor under Subsection (1), or an attempt to commit this offense, that a law enforcement officer or an undercover operative who is working with a law enforcement agency was involved in the detection or investigation of the offense.
>
> (3) An enticement of a minor under Subsection (1) with the intent to commit:
> (a) a first degree felony is a second degree felony;
> (b) a second degree felony is a third degree felony;
> (c) a third degree felony is a class A misdemeanor;
> (d) a class A misdemeanor is a class B misdemeanor; and
> (e) a class B misdemeanor is a class C misdemeanor.

STATEMENT OF THE CASE

On June 5, 2001, the State charged Mr. Silvaz with enticing a minor over the Internet, possessing a controlled substance, assaulting a peace officer, and interfering with a peace officer. R. 1. Mr. Silvaz waived his right to a preliminary hearing and the trial court bound the case over for trial. R. 35-36. At some unknown point, the trial court dropped the drug possession count. The trial court conducted a jury trial on November

29, 2001, and the jury convicted Mr. Silvaz of all three charges. R. 159; 212: 168.

On April 2, 2002, the trial judge sentenced Mr. Silvaz to a term of one to 15 years in the state prison but suspended the term and ordered Mr. Silvaz to serve one year in jail with the possibility of early release into an in-patient program. R. 195; Addendum A. For the assault charge, the trial judge sentenced Mr. Silvaz to one year in jail but suspended the sentence. R. 195-96. He likewise imposed a sentence of six months in jail for interfering with police and suspended the sentence. R. 195-96. The trial judge further placed Mr. Silvaz on probation for 36 months and ordered the Department of Adult Probation and Parole to evaluate Mr. Silvaz's counseling needs. R. 196-97. Mr. Silvaz filed a timely notice of appeal on April 11, 2002. R. 198.

STATEMENT OF THE FACTS

On May 24, 2001, Rhett McQuiston, an investigator with the Internet Crimes Against Children Task Force ("Task Force"), was posing as a 13-year old boy on the Internet. R. 212: 25-31. Officer McQuiston pretended he was E. J. Birch, a junior high school student in Murray, Utah. R. 32. In actuality, he was using a computer in a downtown Salt Lake City law enforcement building. R. 212: 60.

Officer McQuiston created a user profile listing E. J.'s hobbies and interests and established the user name of E.J.Bizkit after a popular music group. R. 212: 31. Officer McQuiston entered an Internet Service Provider chat room called "M4MUtah" which

caters to homosexual men in Utah. R. 212: 31. A chat room is a computer program that allows Internet users with similar interests to either send instant messages directly to a specific person or to converse with several users simultaneously. R. 212: 26-27, 32.

While posing as E. J., Officer McQuiston received an instant message from a user named "Monneblue." R. 212: 32. The following exchange took place with Officer McQuiston's subsequent explanations of slang terms and Internet abbreviations in brackets (misspellings and typographical errors were included in the original dialogue):

> Monneblue: HIGH
>
> EJBizkit: hey u
>
> Monneblue: HOW GOES IT
>
> EJBizkit: good and u
>
> Monneblue: HOW OLD R YOU?
> Monneblue: GREAT THANKS
>
> EJBizkit: how old r u and why r u yelling at me [capital letters may signify yelling when chatting on the Internet or conversing in e-mail].
>
> Monneblue: NOT
>
> EJBizkit: i am 13 from murray and will be 14 in July
> EJBizkit: asl [request for age, sex, and location].
>
> Monneblue: WHAT EVER
> Monneblue: K
> Monneblue: THANKS
>
> EJBIZKIT: so wsup

Monneblue: JUST HORNY

EJBizkit: lol [laughing out loud]

Monneblue: BIG AND ROCK HARD
Monneblue: AND YOU?

EJBizkit: yea kind of

Monneblue: HOW BIG R U?

EJBizkit: 5'5 135 pounds brown hair and eyes u

Monneblue: LQQK AT MY PROFILE
Monneblue: YOU HAVE A PIC [requesting a picture]

EJBizkit: only my year book ones and i got rid of themi look stupid

Monneblue: NO NEW ONES
Monneblue: WHOM DO YOU LIVE WITH?

EJBizkit: my mom

Monneblue: YOU NEAR DOWN TOWN

EJBizkit: who do you u live with

Monneblue: BROTHER

EJBizkit: i live in murray where do you liv

Monneblue: ROY

EJBizkit: kewl [cool] its just me and mom

Monneblue: HOW FAR IS MURRAY

EJBizkit: roy is brother

Monneblue: NO I LIVE IN ROY WITH MY BROTHER

EJBizkit: oh kewl where is roy

Monneblue: WHERE IS MURRAY
Monneblue: ROY IS BY OGDEN

EJBizkit: kewl
EJBizkit: do u know wher murray is

Monneblue: NOPE
Monneblue: WHERE

EJBizkit: its by salt lake
EJBizkit: on the other side

Monneblue: HOW FAR
Monneblue: DO YOU DRIVE
Monneblue: HELLO [indicating possible interruption in communications]

EJBizkit: i cant get my licenc until i turn 16
EJBizkit: i walk everywhere

Monneblue: HOW FAR IS MURRAY FROM DOWN TOWN SLC

EJBizbit: maybe 15 minutes if u drive a lot longer if u walk

Monneblue: WELL I WILL BE IN SLC TO NIGHT?

EJBizkit: kewl where at

Monneblue: IF YOU WANT TO MEET ME
Monneblue: BY SHILO

EJBizkit: that would be kewl what will we do

Monneblue: FUN

Monneblue: SEX
Monneblue: AND ALL
Monneblue: DO YOU DRINK

EJBizkit: kewl

Monneblue: OR SMOKE

EJBizkit: i drink

Monneblue: YOU DO YOU SMOKE BUD [marijuana]

EJBizkit: a couple of times

Monneblue: I HAVE SOME
Monneblue: DO YOU WANA MEET

EJBizkit: yeah that would be kewl
EJBizkit: what should we do

Monneblue: WHAT IS YOUR NUMBER SO I CALL YOU WHEN I GET THERE

EJBizkit: ah my mom is home she will kill me if u call

Monneblue: ME ANTHONY
Monneblue: SO HOW R WE GOING TO MEET

EJBizkit: im ej do u know where my school is it is riverview jr high

Monneblue: NEAR WHERE

EJBizkit: im in the 8th grade

Monneblue: THATS FINE
Monneblue: WILL YOU BE ABLE TO CUM OUT [ejaculate]

EJBizkit: kewl i live by my school and riverview jr. high is on 7thwest and 5900 south in murray
EJBizkit: sounds fun what do u want to do

Monneblue: DRINK
Monneblue: AND SUCK EACHOTHER

EJBizkit: kewl sounds fun
EJBizkit: r u sure u will meet me or be a shine [no show]

Monneblue: WHAT IS YOUR NAME
Monneblue: I WANT TO MEET YOU

EJBizkit: ej

Monneblue: HOW BIG R YOUR FEET

EJBizkit: 8

Monneblue: NICE
Monneblue: AND YOUR COCK

EJBizkit: my nikes r
EJBizkit: i dont no
EJBizkit: kinda big i guess r u

Monneblue: IS IT SAMLL?
Monneblue: 7.5

EJBizkit: in the middle i guess

Monneblue: NICE
Monneblue: YOU LIKE TO SUCK

EJBizkit: like ur dick

Monneblue: YUP
Monneblue: DO YOU

EJBizkit: yeah do you

Monneblue: COOL
Monneblue: WHAT ELSE

EJBizkit: ive done some stuff
EJBizkit: what do u want to do

Monneblue: LIKE WHAT
Monneblue: SUCK AND FUCK
Monneblue: YOU LIKE TO FUCK

EJBizkit: yeah
EJBizkit: do u

Monneblue: YUP
Monneblue: HOW ABOUT DO YOU FUCK ASS

EJBizkit: once do u

Monneblue: YUP
Monneblue: AND I LIKE TO GET FUCKED TOO

EJBizkit: kewl
EJBizkit: u seem cute

Monneblue: DO YOU LIKE THAT
Monneblue: THANKS
Monneblue: SO DO YOU
Monneblue: WELL I GOT TO GET READY
Monneblue: CALL ME

EJBizkit: kewl when should we meet and where we can at my school
EJBizkit: or the gas station by it

Monneblue: K
Monneblue: 725-2455
Monneblue: IS MY CELL

EJBizkit: kewl who do i ask for

Monneblue: SO CALL ME AFTER 8:30
Monneblue: ANTHONY

EJBizkit: kewl call after 830

Monneblue: K
Monneblue: HOW FAR FROM SHILO DO YOU LIVE

EJBizkit: r u for real i don't want to get ready
EJBizkit: and have u not show

Monneblue: IM FOR REAL AND I WILL SHOW
Monneblue: IM ASKING HOW FAR FROM SHILO DO YOU LIVE

EJBizkit: where should we meet at the gas station by my school riverview jr high
EJBizkit: what is shilo

Monneblue: INN
Monneblue: HOTEL

EJBizkit: kewl

Monneblue: HOW FAR DO YOU LIVE FROM THERE

EJBizkit: murray is about a 15 drivehey u [possible interruption in communications]
EJBizkit: from salt lake city

Monneblue: SO YOU NOT NEAR DOWN TOWN
Monneblue: I NEVER BEEN TO MURRAY

EJBizkit: yeah i am its just about 15 minutes is all
EJBizkit: is that a problem
EJBizkit: if u meet early i could may be take trax downtown

Monneblue: K
Monneblue: KEWL
Monneblue: THAT IS GREAT
Monneblue: AND WE WILL RENT A ROOM

EJBizkit: i think it is

Monneblue: AND WE WILL HAVE FUN
Monneblue: GOT TO GET READY K

EJBizkit: kewl i have to be home by 11 because it is a school night

Monneblue: K
Monneblue: IF YOU NEED MONEY I WILL GIVE YOU SOME
Monneblue: K

EJBizkit: so what should we do meet at my school or somewhere else
EJBizkit: hey u

Monneblue: MEET DOWN TOWN
Monneblue: I DON'T KNOW WHERE MURRAY IS

EJBizkit: kewl i can take trax downtown

Monneblue: I GOT TO GET READY
Monneblue: K

EJBizkit: where should we meet

Monneblue: MAKE SURE TO TAKE MY NUMBER
Monneblue: SHILO
Monneblue: K
Monneblue: I GOT TO GET READY

EJBizkit: where is the shilo

Monneblue: BY THE SALT PALACE

EJBizkit: k i will call and we wil meet should i take trax now down town o r when

Monneblue: IT HAS RED LIGHTS
Monneblue: I WILL BE LEAVING AT 8:30

EJBizkit: when should i be there

Monneblue: BE THERE AT 940

EJBizkit: k at the shilo

Monneblue: YES
Monneblue: TAKE MY NUMBER

EJBizkit: u want me there at the shilo in its a hotel by the salt palace right
EJBizkit: k give it to me again

Monneblue: I WILL HAVE MY PHONE
Monneblue: YUP
Monneblue: 725-2455

EJBizkit: kewl what do you look like

Monneblue: GOT TO GO

EJBizkit: so i know who u r and stuff

Monneblue: SEE MY PRO FILE

EJBizkit: k so ur for real it's a long way ofr me to go if you shine

Monneblue: AND I WILL HAVE A BLACK JAKET
Monneblue: I WILL BE THERE
Monneblue: I PROMISE

EJBizkit: kewl
EJBizkit: me to it will be fun

Monneblue: BE WEARING BLUE JEANS

EJBizkit: i will call first

Monneblue: AND BLACK SHIRT
Monneblue: AND BLACK JACKET

EJBizkit: i should wear blue jeans or u will be

Monneblue: K

EJBizkit: so kewl

Monneblue: K BYE
Monneblue: LEAVING TO GET READY

EJBizkit: i will call when i get down town so be there k
EJBizkit: by

Monneblue: K REMEMBER BE THER AT 940
Monneblue: BI

EJBizkit: k cya there

Monneblue: ;-) [symbol for a smiley face]

R. 212: 37-48; Exhibit 1; Addendum B.

Following this conversation, Officer McQuiston used a computer program to print the entire conversation. R. 212: 34-35. The members of the Task Force then planned to establish surveillance around the front entrance of the Shilo Inn in Salt Lake City. R. 212: 49. To confirm that the person known as Monneblue was planning to meet E. J., a

police officer, posing as E. J., telephoned Monneblue's cell phone and confirmed the meeting. R. 212: 62.

Several task force members joined in the surveillance. Officer McQuiston sat on a bench at a bus stop in front of the Shilo Inn. R. 212: 50. Salt Lake City Police Detective Ryan Atack stood on the corner of West Temple Street and 200 South, 40 or 50 feet away from the bus stop. R. 212: 84. Meanwhile, a special agent for the Federal Bureau of Investigations served as a decoy for E. J. R. 212: 49. All three law enforcement officers were in plain clothes. R. 212: 76. Several other plain clothes officers were placed in unmarked police cars as back-up help. R. 212: 49-50, 77.

At about 10:00 p.m., a bus stopped in front of the Shilo Inn which Mr. Silvaz exited. R. 212: 50. Mr. Silvaz generally matched the description of Monneblue; specifically, he wore a black jacket, a black shirt, and blue jeans. R. 212: 50. Mr. Silvaz walked to the wall of the Shilo Inn and stood against it. R. 212: 51.

Over the span of approximately four minutes, on three occasions, Mr. Silvaz walked up behind the special agent serving as the decoy, looked at him, and then returned to the place where he was standing. R. 212: 51. Mr. Silvaz then proceeded to make a call on his cell phone as he walked down 200 South. R. 212: 86. Upon seeing Mr. Silvaz departing, Det. Atack followed Mr. Silvaz and gave the arrest signal to the other officers. R. 212: 51.

Det. Atack placed his hand on Mr. Silvaz's shoulder, identified himself as a police

officer, informed Mr. Silvaz that he was under arrest, and ordered him to place his hands on his head. R. 212: 87. Mr. Silvaz began to raise his hands but then dropped his left arm to his waist. R. 212: 87. Concerned for his safety, Det. Atack repeated that he was a police officer and commanded Mr. Silvaz to place his hands on his head. R. 212: 87. Mr. Silvaz then turned around and faced Det. Atack with his left hand remaining at his side. R. 212: 86-87. Det. Atack responded by forcibly restraining Mr. Silvaz. R. 212: 88-90.

About this time, Officer McQuiston approached and observed Det. Atack announcing that Mr. Silvaz was under arrest and pinning Mr. Silvaz against the wall. R. 212: 52. Officer McQuiston announced several times that he was a police officer and that Mr. Silvaz was under arrest, but, Mr. Silvaz resisted and tried to free himself. R. 212: 52, 54. Det. Atack tried to place handcuffs on Mr. Silvaz but Mr. Silvaz temporarily freed himself by pushing against the wall. R. 212: 53. Officer McQuiston then interceded and tried to place his knee behind Mr. Silvaz but his knee slipped and he lost leverage, allowing Mr. Silvaz to turn around. R. 212: 53. Mr. Silvaz looked at Officer McQuiston and then struck him in the chest with an elbow. R. 212: 53-54.

During this scuffle, the back-up officers were arriving in their unmarked police cars with sirens blaring and lights on their cars' front grills flashing. R. 212: 54, 77. Despite the presence of several police officers, Mr. Silvaz yelled an obscenity and was finally subdued. R. 212: 55. The police searched Mr. Silvaz and found a green, leafy substance and $105 in cash. R. 212: 57, 90. They also found a post-it note with E. J.'s

name, Internet user name, and school address written on it. R. 212: 57-58. The police also dialed the cell phone number Monneblue had given to E. J. and confirmed that the number belonged to the cell phone in Mr. Silvaz's possession. R. 212: 62-63.

The police arrested Mr. Silvaz and charged him with enticing a minor over the Internet, possession of a controlled substance, assaulting a peace officer, and interfering with a lawful arrest. R. 1. At some unknown point, the drug possession charge was dismissed and the prosecution continued on the remaining three charges.

At a jury trial, Mr. Silvaz testified that he believed that he was conversing with an adult and that his friends were playing a joke on him. R. 212: 108. Specifically, Mr. Silvaz explained that he had been chatting online with several friends who were planning to meet at a club later that night. R. 212: 105-06. The club was located a block or so from the Shilo Inn. R. 212: 105-06. Mr. Silvaz's friends invited him to join them. R. 212: 106. Mr. Silvaz informed his online friends that he did not want to go out because he had recently quit drinking. R. 212: 105-06.

Upon hearing this excuse, Mr. Silva's friends sent mocking messages to him about being too old and unwilling to meet new people. R. 212: 107. The friends encouraged Mr. Silvaz to contact someone in the chat room and see if he could meet someone new at the club. R. 212: 107. Mr. Silvaz agreed and contacted EJBizkit. R. 212: 107. When E. J. indicated that he was 13 years old, Mr. Silvaz responded "whatever" and believed that one of his friends was joking with him. R. 212: 108; Addendum B at 1. As he

communicated with E. J., Mr. Silvaz relayed the responses to his friends online. R.212: 108. The friends then instructed him to send various explicit statements to E. J.. R. 212: 108, 116.

Mr. Silvaz testified that he had no intention of meeting a 13-year old boy at the Shilo Inn. Rather, he claimed that he planned to go to the club and see if E. J., whom he believed was an adult, was there. R. 212: 113. While he walked to the club, Det. Atack grabbed him from behind. R. 114-15. Because he did not hear any announcements about the police or an arrest, Mr. Silvaz thought he was being beaten up or mugged. R. 212: 114-15. He claimed that he vigorously resisted out of fear for his safety and that he continued to resist when he saw that the men surrounding him were in plain clothes. R. 212: 115. He claimed further that he heard no sirens and saw no lights. R. 212: 125.

On cross-examination, the prosecutor asked Mr. Silvaz, "Where are these friends" with whom Mr. Silvaz claimed to be conversing online. R. 212: 120. Mr. Silvaz stated that he had telephoned one of them prior to trial but the number had been changed. R. 212: 120. The prosecutor then asked Mr. Silvaz, "What are their names?" R. 212: 120. Mr. Silvaz refused to identify them. R. 212: 120. In response, the prosecutor derisively described the friends as "these friends with no names [who] told you what to say." R. 212: 120. On redirect, Mr. Silvaz testified that he did not reveal his friends' identities because they did not want to be publicly exposed as communicating in a gay chat room. R. 212: 126.

During closing arguments, the prosecutor described the conversation with E. J. as direct evidence of Mr. Silvaz's intent. R. 212: 154. The prosecutor argued that, in contrast to the online chat, Mr. Silvaz's claims failed to support that he was joking with his online friends:

> What we don't have evidence of is these friends who told him what to say. That's convenient. We don't know who these friends are, we don't know what they hounded him to say. That's all convenient. That's exactly what probably should be said, ["]I don't think it was a kid, I didn't think I was going to actually do anything. That's not what's important.["]

R. 212: 154. The prosecutor summarized his argument by urging the jury to "use the evidence that is there, not the convenient stuff that is not there." R. 212: 157.

The jury convicted Mr. Silvaz on all three charges. R. 159; 212: 168. The trial judge sentenced Mr. Silvaz to serve a year in jail for all three convictions and indicated that Mr. Silvaz could be released sooner if he secured an in-patient treatment program. R. 195-96. The judge also placed Mr. Silvaz on probation for 36 months and ordered APP to evaluate Mr. Silvaz's treatment needs. R. 196-97. This appeal followed. R. 198.

SUMMARY OF THE ARGUMENT

The trial court erroneously convicted Mr. Silvaz under the Internet enticement statute because that provision is contradictory and, therefore, fails to state a crime. That statute requires the State to prove both that a person has not committed a solicitation,

conspiracy, or attempt crime but has solicited, enticed, or lured a minor to engage in sexual activity or has attempted to do so. Because the plain language of this statute requires proof of both the existence and nonexistence of an inchoate offense, the statute is internally inconsistent. When competing provisions of a statute conflict in this manner, this court must invalidate the law and return it to the legislature for correction. Even were this Court to attempt to construe the legislature's intent in enacting competing provisions, the legislative history provides no guidance and it is impossible to determine the purpose behind the statute given its contradictory terms.

The conflicting provisions of the Internet enticement statute also render it unconstitutionally vague. Although the statute states that the conduct cannot amount to an attempt, conspiracy, or solicitation, it does not define what actions a person must take to violate the provision. Because reasonably intelligent persons cannot reconcile the terms of the statute, the statute fails to give adequate notice of prohibited conduct and it unfairly affords the police complete discretion to apply the statute.

The flaws in the Internet enticement statute also made it impossible for the jury to find guilt beyond a reasonable doubt. The evidence presented below failed to address Mr. Silvaz's knowledge and intent during the Internet chat. Given the conflicting provisions of the statute, no reasonable juror could convict Mr. Silvaz or find both the nonexistence of a solicitation crime and a solicitation at the same time.

Finally, the prosecutor unfairly commented on the failure to call Mr. Silvaz's

online friends to support the defense. Before commenting on the failure to call witnesses, prosecutors must obtain advance authorization from the trial judge and show that the witnesses are peculiarly available to the defense. Here, the prosecutor never sought advance permission. Moreover, the uncalled witnesses were equally available to the State, and could have been identified through normal investigative procedures. The trial judge plainly erred in failing to strike the prosecutor's comments because they communicated to the jury that Mr. Silvaz was guilty because his failure to present his online friends' testimony showed that the friends could not support his defense. These comments also rendered a guilty verdict more likely because they directly attacked the central issue in this case: Mr. Silvaz's credibility.

ARGUMENT

Several grounds require the reversal of Mr. Silvaz's conviction for enticing a minor. First, because the Internet enticement statute is internally inconsistent and contradictory, this Court must return it to the legislature for clarification. Second, the statute is so flawed that it fails to give reasonable persons notice of prohibited criminal conduct. Third, given the contradictory terms of the statute, the jury could not have found Mr. Silvaz guilty beyond a reasonable doubt. Fourth, the prosecutor's improper comments on Mr. Silvaz's failure to call his online friends to testify prejudiced the defense and influenced the jury to convict Mr. Silvaz.

I. THE INTERNAL INCONSISTENCIES IN THE INTERNET ENTICEMENT STATUTE REQUIRE REVERSAL OF THE ENTICEMENT CONVICTION AND LEGISLATIVE REDRAFTING

When a statute is internally inconsistent, it deprives criminal defendants of notice of a crime. Here, the Internet enticement statute requires the State to prove that a person has not committed the crimes of attempt, conspiracy, or solicitation but then obligates the State to show that a person has used a computer to solicit, seduce, lure, or entice a minor or has attempted to do so. This crime, thus, requires the State to prove both the nonexistence and the existence of the same crime. Because that statute creates an impossible situation, it is "fatally flawed" and requires reversal. R. 212: 97-98.

In drafting the Internet enticement statute, the legislature created "patently inconsistent" requirements. Nelson v. Salt Lake County, 905 P.2d 872, 876 (Utah 1995). That statute requires the State to prove that no inchoate crimes occurred and then defines the offense in terms of an inchoate crime:

> A person commits enticement of a minor over the Internet when, not amounting to an attempt, conspiracy, or solicitation under Section 76-4- 101, 76-4-201, or 76-4-203, the person knowingly uses a computer to solicit, seduce, lure, or entice, or attempt to solicit, seduce, lure, or entice a minor or a person the defendant believes to be a minor to engage in any sexual activity which is a violation of state criminal law.

Utah Code Ann. § 76-4-401(1) (Supp. 2002).

The plain words of this statute create an irreconcilable contradiction. In

interpreting statutes, this Court must "seek to give effect to the intent of the legislature in light of the purpose the act was meant to achieve." Gutierrez v. Medley, 972 P.2d 913, 915 (Utah 1998). In doing so, this court first looks "'to the plain language of the [statute]." Id. This Court "need not look beyond the plain language of [the] provision unless [this Court] find[s] some ambiguity in it." In re Worthen, 926 P.2d 853, 866 (Utah 1996).

The plain language of the Internet enticement statute requires the State to prove that a person has used a computer to solicited a minor or attempted to do so but has not committed an attempt, conspiracy, or solicitation crime. Utah Code Ann. § 76-4-401 (Supp. 2002). This statute is similar to the elections statute construed in Nelson in which the provision both gave county commissioners discretion to terminate an election under a citizens initiative but also required them to hold an election unless a majority of signatories on the initiative withdrew their support. 905 P.2d at 875-76 (construing former Utah Code Annotated section 10-2-102.8(2)). The Utah Supreme Court ruled that the plain language of the elections statute was clear but "patently inconsistent" and "contradictory." Id. at 876.

When a statute is plain but "internally inconsistent," this court must invalidate the statute and allow the legislature to correct the inconsistency. Id. Reconciling the competing provisions of the Internet enticement statute would require this Court to "render certain viable parts meaningless and void." Id. "To choose which statement

controls over the whole would amount to legislation by judicial fiat." Id. Based on the separation of powers doctrine, "the power to remedy this inconsistency lies within the province of our legislature." Id. Because the Internet enticement statute is plain but contradictory, this Court must return that statute to the legislature for correction. Id.

Even if this Court were to conclude that the statute was ambiguous, the legislative history provides no enlightenment as to the legislature's intent. When a statute is ambiguous, this Court may "seek guidance from the legislative history." Worthen, 926 P.2d at 866. The legislature enacted the Internet enticement statute in 2001. See 2001 Utah Laws, ch. 353, §1 (effective April 30, 2001). Although the legislature extensively revised the bill for that provision, the bill file contains no hint of the legislature's intent in enacting the bill into law. See Bill File, House Bill 181, 54th Utah Leg., 2001 Gen. Sess. at http://www.image.le.state.ut.us/imaging/bill.asp. Further, both houses of the legislature unanimously adopted the final draft of that bill without any debate on the measure. Floor Debate, 54th Utah Leg., Gen. Sess. (February 13, 2001) (House Recording no. 1, counter# 1946); Floor Debate, 54th Utah Leg., Gen. Sess. (February 21, 2001) (Senate Recording 33, counter# 2460); Floor Debate, 54th Utah Leg., Gen. Sess. (February 27, 2001) (Senate Recording 43, counter# 1937).

The contradictory terms of that statute also prevent this Court from discerning "the purpose the act was meant to achieve." Gutierrez, 972 P.2d at 915. The Internet enticement statute obviously seeks to protect minors from sex offenders who use the

Internet. But, when contradictory phrases require appellate courts to "choose which statement controls," appellate courts must defer to the legislature to correct a statute. Nelson, 905 P.2d at 876. Thus, even if this Court could identify the exact purpose behind the Internet enticement statute, this Court must allow the legislature to remedy the statute; otherwise, this Court would engage in "legislation by judicial fiat." Id. Because the plain language of that statute and the legislative history both lead to the same irreconcilable conclusion, this Court should invalidate the provision and reverse Mr. Silvaz's conviction. Id.

II. THE INTERNET ENTICEMENT STATUTE IS UNCONSTITUTIONALLY VAGUE

The Internet enticement statute also violates the due process right to notice because its provisions are contradictory and vague. Requiring the State to prove both that no solicitation crime occurred but that a person has solicited a minor deprives an average citizen of notice of prohibited conduct. The statute fails to define what constitutes the criminal conduct listed in the statute. Because the contradictory provisions cannot be reconciled, reversal is required.

A statute is unconstitutionally vague if it: (1) fails to provide a "person of ordinary intelligence a reasonable opportunity to know what is prohibited;" (2) "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc

and subjective basis, with the attendant dangers of arbitrary and discriminatory application;" or (3) inhibits the exercise of First Amendment freedoms. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). As the Utah Supreme Court has ruled, "'[a] criminal statute must be sufficiently clear and definite to inform persons of ordinary intelligence what their conduct must be to conform to its requirements and to advise one accused of violating it what constitutes the offense with which he is charged.'" State v. Blowers, 717 P.2d 1321, 1322 (Utah 1986) (quoting Greaves v. State, 528 P.2d 805, 807 (Utah 1974)).[2]

In reviewing the constitutionality of a statute, this court presumes that statutes are valid and it resolves any reasonable doubts in favor of constitutionality. Provo City v. Thompson, 2002 UT App 63, ¶10, 44 P.3d 828. However, criminal statutes must be especially clear to provide defendants sufficient notice of what conduct may lead to the deprivation of their personal liberty. "[N]othing is a crime which is not clearly and unmistakably made a crime." State v. Lambert, 514 So. 2d 550, 552 (La. Ct. App. 1987).

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[2]Defense counsel preserved this issue by arguing that the Internet enticement statute was "fatally flawed" because it required the State to prove "both a solicitation and not a solicitation beyond a reasonable doubt." R. 212: 98. In any event, the trial judge plainly erred in allowing the State to prosecute Mr. Silvaz based on a vague, contradictory statute. The trial court plainly errs when "(i) an error was made; (ii) the error should have been obvious to the trial court; and (iii) the error was harmful, so that in the absence of the error, a more favorable outcome was reasonably likely." State v. Helmick, 2000 UT 70, ¶9, 9 P.3d 164. The Internet enticement statute satisfies these three requirements because it is obviously contradictory and is, therefore, vague. Moreover, because that statute is invalid, the State lacked authority to prosecute Mr. Silvaz under that provision.

Likewise, under the rule of lenity, any ambiguity in a criminal statute must be construed in the defendant's favor. State v. Patience, 944 P.2d 381, 385 (Utah Ct. App. 1997).

The Internet enticement statute is vague because it fails to identify what conduct constitutes a crime. That statute clearly states that the crime cannot amount to an "attempt, conspiracy, or solicitation" but the purports to define a separate crime by barring persons from "solicit[ing], seduc[ing], lur[ing], or entic[ing], or attempt[ing] to solicit, seduce, lure, or entice a minor" to engage in unlawful sexual activity. Utah Code Ann. § 76-4-401(1) (Supp. 2002). The statute fails to explain any difference between an inchoate crime and the prohibited conduct.

Moreover, the statute does not indicate what conduct constitutes an offense. For example, does a person violate the statute by simply communicating sexual message to a minor over the Internet or must the person take some concrete steps to carry out the solicited act? Because the statute provides no parameters for the prohibited conduct, it fails to give reasonable persons adequate notice of a crime. Grayned, 408 U.S. at 108.

For the same reasons, the Internet enticement statute grants law enforcement officials "virtually unrestrained power . . . to arrest and charge persons with a violation." Logan City v. Huber, 786 P.2d 1372, 1376 (Utah Ct. App. 1990). Under that statute, the police have enormous discretion to arrest Internet users who even appear to be engaging in sexual discussions with minors. Without more definite guidance from the legislature, the police have power to detain and arrest possibly innocent or joking communications.

This situation is similar to the ordinance at issue in City of Chicago v. Morales, 527 U.S. 41, 60-61 (1999), that allowed the police to disperse groups who gathered for "'no apparent purpose.'" (Quoting ordinance). Because this phrase granted the police unfettered discretion to assess a person's motives for gathering, the Supreme Court ruled that the statute was unconstitutionally vague. Id. The Internet enticement statute suffers from the same defect by failing to specify what conduct constitutes a solicitation or an attempt to solicit a minor while not amounting to an attempt, conspiracy, or solicitation crime.

The Internet enticement statute is further vague because it is so "'conflicting and inconsistent in its provisions that it cannot be executed.'" Commonwealth v. Harbst, 763 A.2d 953, 957 (Pa. Commw. Ct. 2000) (quoting Pennsylvania Builders Association v. Dep't of Revenue, 552 A.2d 730, 737 (Pa. Commw. Ct. 1989) (internal citations omitted)). That statute criminalizes the very conduct that the statute explicitly states that the crime cannot constitute. This plain contradiction defeats any presumption of constitutionality because there is simply no way to reconcile the two conflicting requirements.

The Internet enticement statute is similar to a Louisiana statute that criminalized the possession of "'apomorhine'" but exempted possession of "'isoquinoline alkaloids of opium.'" Lambert, 514 So. 2d at 552 (quoting former La. Rev. Stat. Ann. Section 40: 967). Expert testimony established that apomorhine was an isoquinoline alkaloid of

opium. Id. The Louisiana Court of Appeals ruled that these "contradictory" terms could not be reconciled. Id. at 553. Thus, because the statute failed to clearly state a crime, no crime occurred. Id.; see People v Monroe, 515 N.E.2d 42, 44 (Ill. 1987) (statute that required one mens rea under the definition of a crime and a different mens rea under the punishment section for that crime "directly conflict[ed]").

The contradictory language of the Internet enticement statute violated Mr. Silvaz's right to due process because he lacked notice of what conduct constituted a crime. Accordingly, Mr. Silvaz requests this Court to reverse his conviction.

III. THE CONFLICTING LANGUAGE OF THE INTERNET ENTICEMENT STATUTE PREVENTED A REASONABLE JURY FROM FINDING GUILT BEYOND A REASONABLE DOUBT

The language of the Internet enticement statute is so muddled that the State could not establish sufficient evidence of a crime. In reviewing the sufficiency of the evidence, this Court "view[s] the evidence and the inferences reasonably drawn therefrom in the light most favorable to the jury verdict and assume[s] that the jury believed the evidence and inferences that support the verdict." State v. Wood, 868 P.2d 70, 87 (Utah 1993), overruled on other grounds in State v. Mirquet, 914 P.2d 1144, 1147 n.2 (Utah 1996). Reversal is required "when the evidence is so inconclusive or inherently improbable" that reasonable persons must have entertained a reasonable doubt about the defendant's guilt.

State v. Goddard, 871 P.2d 540, 543 (Utah 1994).

The marshaled evidence supporting the conviction included the transcript of the Internet chat in which E. J. stated that he was 13-years old. Mr. Silvaz also invited E. J. to meet him at a hotel to engage in sodomy. Mr. Silvaz then appeared at the hotel, waited several minutes, and looked for someone. He also had E. J.'s Internet user name and school address written on a piece of paper in his pocket.

Despite these facts, the evidence does not address Mr. Silvaz's intent or knowledge when he made the communications. Given this lack of evidence and the convoluted terms of the Internet enticement statute, the jury had no means of deciding whether Mr. Silvaz had the requisite intent or knowledge to commit a crime. That statute required the State to prove "both a solicitation and not a solicitation beyond a reasonable doubt." R. 212: 98. Under the plainly conflicting requirements of the statute, the jury would have had to find the existence and the nonexistence of a solicitation. There was no way for the jury to reasonably find the existence of competing facts as required under the statute. Given this impossibility, reversal is required. Goddard, 871 P.2d at 543.

IV. THE PROSECUTOR TAINTED THE JURY'S VERDICT BY COMMENTING ON THE FAILURE TO CALL DEFENSE WITNESSES TO TESTIFY

Reversal and a new trial are also required because the prosecutor improperly commented on Mr. Silvaz's failure to call his online friends to testify. Prosecutors may

only comment on the failure to call witnesses when witnesses are uniquely available to the defendant. Given the inference of guilt created by comments on the failure to call witnesses, prosecutors must seek an advance ruling from the trial court to make such comments. Here, the prosecutor neither sought an advance ruling nor were the witnesses peculiarly available to Mr. Silvaz.

The prosecutor's comments on Mr. Silvaz's failure to present the testimony of his online friends unfairly and prejudicially biased the jury. Under the missing witness rule, "'if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it permits an inference that the testimony, if produced, would have been unfavorable.'" State v. Smith, 706 P.2d 1052, 1057 (Utah 1985) (quoting United States v. Young, 463 F.2d 934, 939 (D.C. Cir. 1972)). The proponent of the inference has the burden of establishing that a witness is peculiarly within the power of the other party. Id. at 1057-58. The proponent makes such a showing when "'the witness is physically available only to the opponent, or [] the witness has the type of relationship with the opposing party that pragmatically renders his testimony unavailable to the opposing party.'" Id. at 1058 (quoting Chicago College of Osteopathic Medicine v. George A. Fuller, Co., 719 F.2d 1335, 1353 (7th Cir. 1983)). But, given the risk of exposing the jury to highly prejudicial comments, parties seeking to comment on the failure to call witnesses must obtain "'an advance ruling from the trial court'" before making such arguments. State v. Thompson, 776 P.2d 48, 50 (Utah 1989)

(quoting Gass v. United States, 416 F.2d 767, 775 (D.C. Cir. 1969)).

Here, the prosecutor never sought an advance ruling before arguing that Mr. Silvaz failed to call his online friends to testify. Rather, he argued that it was "convenient" for Mr. Silvaz not to call his online friends to testify because it allowed Mr. Silvaz to claim that he was only joking and that he was mistaken about E. J.'s age. The obvious implication of these arguments was that Mr. Silvaz was guilty because had he called his friends to testify they would not have supported his story.

Had the prosecutor properly sought an advance ruling, the trial court could have realized that the State had equal access to the uncalled witnesses. Although Mr. Silvaz apparently knew the names of his online friends, the State could have obtained a search warrant and examined Mr. Silvaz's computer for records of his Internet communications. A subpoena to the Internet service provider could have also revealed the user names and identities of the persons using the chat room M4MUtah on the day in question. By employing these relatively simple means, the State had access to all persons that Mr. Silvaz communicated with over the Internet. Because the prosecutor never sought an advance ruling and given that the online friends were equally accessible to both parties, the prosecutor erred in commenting on Mr. Silvaz's failure to call witnesses. Thompson, 776 P.2d at 50.

Although defense counsel failed to object to the prosecutor's improper comments, the trial judge plainly erred in failing to exclude them. The trial court plainly errs when

"(i) an error was made, (ii) the error should have been obvious to the trial court, and (iii) the error was harmful, so that in the absence of the error, a more favorable outcome was reasonably likely." State v. Helmick, 2000 UT 70, ¶9, 9 P.3d 164. The Utah Supreme Court has ruled that prosecutors may not comment on the failure to call defense witnesses in the absence of an advance ruling and when the State has equal access to the witnesses. Thompson, 776 P.2d at 50; Smith, 706 P.2d at 1057-58. Because the prosecutor's comments violated the missing witness rule and given that the law on this issue was "clear," Mr. Silvaz has satisfied the first two requirements of the plain error doctrine. State v. Garcia, 2001 Ut App 19, ¶18, 18 P.3d 1123.

The prosecutor's comments also irreparably harmed Mr. Silvaz's defense. When prosecutors improperly bring to jurors' attention the failure to call witnesses, reversal is required when the defendant shows that "'the jurors were probably influenced by the improper remarks in reaching their verdict.'" Id. (quoting State v. Andreason, 718 P.2d 400, 402 (Utah 1986)). In this case, the main issue below was Mr. Silvaz's intent and knowledge when communicating with E. J. Because Mr. Silvaz's testimony provided the bulk of the evidence to support his lack of criminal intent, his credibility was the key question for the jury. But, the prosecutor's improper comments on the failure to call witnesses directly attacked Mr. Silvaz's credibility and veracity. Those comments communicated to the jury that had Mr. Silvaz jokingly or unknowingly solicited sex with a 13-year old, the online friends would have testified in support of that defense. But,

because Mr. Silvaz never called them to the stand, the prosecutor argued that Mr. Silvaz must have been guilty.

Because the prosecutor's improper comments destroyed Mr. Silvaz's credibility, the comments likely influenced the jury's guilty verdict. Thompson, 776 P.2d at 50. The only evidence establishing Mr. Silvaz's explanation was his own testimony supported by his credibility. Had the prosecutor not unfairly maligned Mr. Silvaz's story, the jury would have been free to believe Mr. Silvaz. The transcript of the Internet chat provides support for Mr. Silvaz's innocence. Specifically, when E. J. stated his age and asked for Mr. Silvaz's age, Mr. Silvaz responded, "Whatever" as if he did not take E. J. seriously. R. 212: 108; Exhibit B at 1. Mr. Silvaz also tried repeatedly to end the conversation by saying that he had to leave to get ready.

Moreover, as trial counsel emphasized, the Internet provides a forum for speech that may not otherwise be communicated in person. R. 212: 18-19, 158. The relative anonymity of the Internet invites speech that pushes the limits of the First Amendment. Here, for example, Mr. Silvaz communicated with other gay men under circumstances where he felt safe in discussing homosexual matters and joking about them. Gay men likely have few other forums in which they enjoy such perceived security, especially when compared to face-to-face encounters.

In direct contrast to these innocent explanations, the prosecutor's erroneous comments directly rebutted Mr. Silvaz's claims. Given the pivotal role that Mr. Silvaz's

credibility played below, the prosecutor's attack on Mr. Silvaz's credibility likely swayed the jury to convict him.

CONCLUSION

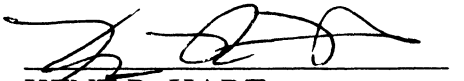
Mr. Silvaz requests this Court to invalidate the Internet enticement statute and to reverse his conviction under that provision.

SUBMITTED this 6th day of August, 2002.

KENT R. HART
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, KENT R. HART, certify that I have caused to be delivered eight copies of this brief to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 6th day of August, 2002.



KENT R. HART

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this ____ day of August, 2002.

_____

ADDENDA

ADDENDUM A

THIRD DISTRICT COURT MURRAY COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES SENTENCING SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 011200597 FS
RAYMOND FLORES SILVAZ, Defendant.	:	Judge: BRUCE LUBECK Date: April 2, 2002

PRESENT
Clerk: lindav
Prosecutor: CRAIG BARLOW
Defendant
Defendant's Attorney(s): ROBERT K HEINEMAN

DEFENDANT INFORMATION
Date of birth: April 25, 1966
Audio
Tape Number: 02-168 Tape Count: 900

CHARGES

1. ENTICING A MINOR OVER THE INTERNET - 2nd Degree Felony
   Plea: Guilty - Disposition: 11/29/2001 Guilty
3. ASSAULT AGAINST POLICE OFFICER - Class A Misdemeanor
   Plea: Guilty - Disposition: 11/29/2001 Guilty
4. INTERFERING W/ LEGAL ARREST - Class B Misdemeanor
   Plea: Guilty - Disposition: 11/29/2001 Guilty

HEARING

Case No: 011200597
Date: Apr 02, 2002

SENTENCE PRISON

Based on the defendant's conviction of ENTICING A MINOR OVER THE INTERNET a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.
The prison term is suspended.

SENTENCE JAIL

Based on the defendant's conviction of ENTICING A MINOR OVER THE INTERNET a 2nd Degree Felony, the defendant is sentenced to a term of 1 year(s)
Based on the defendant's conviction of ASSAULT AGAINST POLICE OFFICER a Class A Misdemeanor, the defendant is sentenced to a term of 1 year(s) The total time suspended for this charge is 1 year(s).
Based on the defendant's conviction of INTERFERING W/ LEGAL ARREST a Class B Misdemeanor, the defendant is sentenced to a term of 6 month(s) The total time suspended for this charge is 6 month(s).

SENTENCE JAIL CONCURRENT/CONSECUTIVE NOTE

COURT ORDERED DEFT COMMITTED TO 1 YEAR JAIL. COURT ORDERED DEFT TO REPORT TO COURTHOUSE ON 4/10/2002 AT 9:00 AM FOR TRANSPORT TO JAIL.

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation & Parole.
Defendant to serve 365 day(s) jail.

PROBATION CONDITIONS

No Violations of the Law
Follow all conditions set by agency.
Maintain full time employment or full time student
COURT ORDERED DEFT TO COMPLETE PSYCHO SEXUAL TREATMENT OR OTHER TREATMENT, AS AP&P DEEMS NECESSARY.
COURT MAY CONSIDER AN EARLY RELEASE INTO A AN IN-PATIENT TREATMENT

PROGRAM.
COURT ORDERED NO CONTACT WITH YOUNG CHILDREN THROUGH EMPLOYMENT AND RECREATIONAL ACTIVITIES.
COURT ORDERED SUBSTANCE ABUSE COUNSELING, IF AP&P DEEMS IT NECESSARY.
COURT ORDERED DEFT TO CONTACT AP&P BEFORE REPORTING TO JAIL.
COURT ORDERED DEFT TO COMPLY WITH ALL STANDARD PROBATION CONDITIONS.
COURT ORDERED DEFT TO COMPLY WITH DR. FOX'S RECOMMENDED TREATMENT.

Dated this 5 day of April, 2002.

BRUCE LUBECK
District Court Judge

ADDENDUM B

eblue: HIGH
it: hey u
eblue: HOW GOES IT
it: good and u
eblue: HOW OLD R YOU?
eblue: GREAT THANKS
it: how old r u and why r u yelling at me
eblue: NOT
it: i am 13 from murray and will be 14 in july
it: asl
eblue: WHAT EVER
eblue: K
eblue: THANKS
it: so wsup
eblue: JUST HORNY
it: lol
eblue: BIG AND ROCK HARD
eblue: AND YOU?
it: yea kind of
eblue: HOW BIG R YOU
t: 5'5 135 pounds brown hair and eyes u
blue: LQQK AT MY PROFILE
blue: YOU HAVE A PIC
t: only my year book ones and i got rid of themi look stupid
blue: NO NEW ONES
blue: WHOM DO YOU LIVE WITH?
t: my mom
blue: YOU NEAR DOWN TOWN
t: who do u live with
blue: BROTHER
t: i live in murray where do u liv
blue: ROY
t: kewl its just me and mom
blue: HOW FAR IS MURRY
t: roy is brother
blue: NO I LIVE IN ROY WITH MY BROTHER
t: oh kewl where is roy
blue: WHERE IS MURRY
blue: ROY IS BY OGDEN
: kewl
: do u know wher murray is
blue: NOPE
blue: WHERE
: its by salt lake
: on the other side
blue: HOW FAR
blue: DO YOU DRIVE
blue: HELLO
: i cant get my licenc until i turn 16
: i walk every where
blue: HOW FAR IS MURRY FROM DOWN TOWN SLC
: maybe 15 minutes if u drive a lot longet if u walk
blue: WELL I WILL BE IN SLC TO NIGHT?

izkit: kewl where at
nneblue: IF YOU WANT TO MEET ME
nneblue: BY SHILO
izkit: that would be kewl what will we do
nneblue: FUN
nneblue: SEX
nneblue: AND ALL
nneblue: DO YOU DRINK
izkit: kewl
nneblue: OR SMOKE
izkit: i drink
nneblue: YOU DO YOU SMOKE BUD
izkit: a couple of times
nneblue: I HAVE SOME
nneblue: DO YOU WANA MEET
izkit: yeah that would be kewl
izkit: what should we do
nneblue: WHAT IS YOUR NUMBER SO I CALL YOU WHEN I GET THERE
izkit: ah my mom is home she will kill me if u call
nneblue: ME ANTHONY
nneblue: SO HOW R WE GOING TO MEET
izkit: im ej do u know where my school is it is riverview jr high
nneblue: NEAR WHERE
izkit: im in the 8th grade
nneblue: THATS FINE
nneblue: WILL YOU BE ABLE TO CUM OUT
izkit: kewl i live by my school and riverview jr high is on 7thwest and 5900 south in murray
izkit: sounds fun what do u want to do
nneblue: DRINK
nneblue: AND SUCK EACHOTHER
izkit: kewl sounds fun
izkit: r u sure u will meet me or be a shine
nneblue: WHAT IS YOUR NAME
nneblue: I WANT TO MEET YOU
izkit: ej
nneblue: HOW BIG R YOUR FEET
izkit: 8
nneblue: NICE
nneblue: AND YOUR COCK
izkit: my nikes r
izkit: i dont no
izkit: kinda of big i guess r u
nneblue: IS IT BIG SMALL?
nneblue: 7.5
izkit: in the middle i guess
nneblue: NICE
nneblue: YOU LIKE TO SUCK
izkit: like ur dick
nneblue: YUP
nneblue: DO YOU
izkit: yeah do u
nneblue: COOL

ıeblue: WHAT ELSE
kit: ive done some stuff
kit: what do u want to do
ıeblue: LIKE WHAT
ıeblue: SUCK AND FUCK
ıeblue: YOU LIKE TO FUCK
ıit: yeah
ıit: do u
eblue: YUP
eblue: HOW ABOUT DO YOU FUCK ASS
ıit: once do u
eblue: YUP
eblue: AND I LIKE TO GET FUCKED TOO
ıit: kewl
ıit: u seem cute
eblue: DO YOU LIKE THAT
eblue: THANKS
eblue: SO DO YOU
eblue: WELL I GOT TO GET READY
eblue: CALL ME
it: kewl when should we meet and where we can at my school
it: or the gas station by it
eblue: K
eblue: 725-2455
eblue: IS MY CELL
it: kewl who do i ask for
eblue: SO CALL ME AFTER 8:30
eblue: ANTHONY
it: kewl call after 830
eblue: K
eblue: HOW FAR FROM SHILO DO YOU LIVE
it: r u for real ı dont want to get ready
it: and have u not show
eblue: IM FOR REAL AND I WILL SHOW
eblue: IM ASKING HOW FAR FROM SHILO DO YOU LIVE
it: where should we meet at the gas station by my school riverview jr high
it: what is shilo
eblue: INN
eblue: HOTEL
it: kewl
eblue: HOW FAR DO YOU LIVE FROM THERE
it: murray is about a 15 drivehey u
it: from salt lake city
eblue: SO YOU NOT NEAR DOWN TOWN
eblue: I NEVER BEEN TO MURRY
.it: yeah i am its just about 15 minutes is all
.it: is that a problem
.it: if u meet early then i could maybe take trax downtown
eblue: K
eblue: KEWL
eblue: THAT IS GREAT
eblue: AND WE WILL RENT A ROOM

EJBizkit: k i will call and we wil meet should i take trax now down town o r when

Monneblue: IT HAS RED LIGHTS
Monneblue: I WILL BE LEAVING AT 8:30

EJBizkit: when should i be there

Monneblue: BE THERE AT 940

EJBizkit: k at the shilo

Monneblue: YES
Monneblue: TAKE MY NUMBER

EJBizkit: u want me there at the shilo in its a hotel by the salt palace right
EJBizkit: k give it to me again

Monneblue: I WILL HAVE MY PHONE
Monneblue: YUP
Monneblue: 725-2455

EJBizkit: kewl what do ~~you~~ look like

Monneblue: GOT TO GO

EJBizkit: so i know who u r and stuff

Monneblue: SEE MY PRO FILE

EJBizkit: k so ur for real it's a long way ofr me to go if ~~you~~ shine

Monneblue: AND I WILL HAVE A BLACK JAKET
Monneblue: I WILL BE THERE
Monneblue: I PROMISE

EJBizkit: kewl

kit: i think it is
ieblue: AND WE WILL HAVE FUN
ieblue: GOT TO GET READY K
kit: kewl i have to be home by 11 because it is a school night
ieblue: K
ieblue: IF YOU NEED MONEY I WILL GIVE YOU SOME
ieblue: K
kit: so what should we do meet at my school or somewhere else
kit: hey u
eblue: MEET DOWN TOWN
eblue: I DON'T KNOW WHERE MURRY IS
kit: kewl i can take trax downtown
eblue: I GOT TO GET READY
eblue: K
kit: where should we meet
eblue: MAKE SURE TO TAKE MY NUMBER
eblue: SHILO
eblue: K
eblue: I GOT TO GET READY
it: where is the shilo
eblue: BY THE SALT PALACE
it: k i will call and we wil meet should I take trax now down town o r when
eblue: IT HAS RED LIGHTS
eblue: I WILL BE LEAVING AT 8:30
it: when should i be there
eblue: BE THERE AT 940
it: k at the shilo
eblue: YES
eblue: TAKE MY NUMBER
it: u want me there at the shilo in its a hotel by the salt place right
it: k give it to me again
eblue: I WILL HAVE MY PHONE
eblue: YUP
eblue: 725-2455
it: kewl what do u look like
eblue: GOT TO GO
it: so i know who u r and stuff
eblue: SEE MY PRO FILE
it: k so ur for real its a long way ofr me to go if u shine
eblue: AND I WILL HAVE A BLACK JAKET
eblue: I WILL BE THERE
eblue: I PROMISE
it: kewl
it: me to it will be fun
eblue: BE WEARING BLUE JEANS
it: i will call first
eblue: AND BLACK SHIRT
eblue: AND BLACK JACKET
it: i should wear blue jeans or u will be
eblue: K
it: so kewl
eblue: K BYE

Monneblue: LEAVING TO GET READY
Ejbizkit: i will call when i get down town so be there k
Ejbizkit: by
Monneblue: K REMEMBER BE THER AT 940
Monneblue: BI
Ejbizkit: k cya there
Monneblue: ;-)